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No.

Supreme Court, U.S.
FILED

In The

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Supreme Court of The United States

October Term, 2003

THOMAS P. CROSBY,

Petitioner,

- against -

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 2, 2004

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (10336)

QUESTION PRESENTED FOR REVIEW:

1. When Congress enacted the Americans with Disabilities Act and explicitly abrogated the State's immunity under the 11th Amendment to the US Constitution did Congress inadvertently stay the waiver of a State's 11th Amendment immunity from claims based on Sec. 504 of the Rehabilitation Act of 1973 even though Congress in the ADA preserved existing law protecting persons with disabilities including Sec. 504?

2. Does a waiver of 11th Amendment immunity from claims arising under Sec. 5 of the Fourteenth Amendment to the U.S. Constitution rest on the same grounds as a waiver of 11th Amendment immunity arising under the Spending Clause that results from the acceptance of federal funds.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1), and the Rules of the Supreme Court 10-14. The Order sought to be reviewed was entered with the Clerk of the Court of Appeals for the Second Circuit on October 3, 2003.

The Statutes at issue on this application include:

42 U.S.C. §12201(b): Nothing in this chapter shall be construed to invalidate or limit the remedies, right and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides for greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. §2000 d-7(a): A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C.

794], title IX of the Education Amendments of 1972 [20 U.S.C.A §1681 et. seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. §6101 et. seq.], and title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et. seq.] or the provisions of any other Federal Statute prohibiting discrimination by recipients of Federal financial assistance.

STATEMENT OF CASE

The District Court had jurisdiction over this claim pursuant to 28 U.S.C. §1343(a)(3) and (4), and 29 U.S.C. §794.

Thomas P. Crosby commenced the present action *pro se* on June 26, 1997 against the New York State Department of Labor (DOL) pursuant to the Americans with Disabilities Act, 42 U.S.C. §12101, et. seq. When respondent moved for summary judgment, it raised for the first time the Court's subject matter jurisdiction over the ADA claim under the 11th Amendment to the United States Constitution. Petitioner was

subsequently permitted to move to file an Amended Complaint that stated a Rehabilitation Act claim, 29 U.S.C. Sec. 701 et seq.

On October 16, 2001 Magistrate Judge Randolph F. Treece denied the motion to amend based on Garcia v. SUNY Health Sciences Center, 280 F. 3d 98 (28 Cir. 2001) (9a-13a).* Timely objections were filed with the District Court which affirmed the Magistrate in a Memorandum Decision dated June 5, 2002 (6a-8a).

The parties thereafter stipulated to a Final Judgment preserving Crosby's right to appeal the denial of his motion to amend the complaint to add a 504 claim (3a-5a).

Crosby perfected his appeal with the Court of Appeals and on October 3, 2003 that Court affirmed the lower court decision (1a-2a). He now applies for a writ of certiorari.

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*All such references are to the Appendix herein.

FACTUAL BACKGROUND

Thomas Crosby, a native of Hornell, New York, had been employed by the State of New York since 1986. Most of his employment was with the Department of Labor (DOL). Crosby, seeking advancement, took and passed a civil service exam for a Grade 14 Computer Programmer/Analyst Trainee. He began work at a Grade 14 position in Albany, New York in 1992. In 1994 he successfully passed a promotional examination for a Grade 18 Senior Computer Programmer/Analyst (CPA). He was canvassed by various State agencies and in December 1994 he was hired at the Department of Health (DOH) as a Grade 18 probationary employee. Crosby asked the DOL for permission to return on September 5, 1995 and to do so as to a Grade 18. He was told he could return as a Grade 14.

On September 15, 1995 Crosby received a preliminary diagnosis of Carpal Tunnel Syndrome (CTS).

On October 9, 1995 he was returned to his Grade 14 permanent position at the DOL. Almost immediately after Crosby returned to the DOL, he requested accommodation for his CTS. Crosby was reassigned to Customer Service and Support (CSS). In CSS he shared responsibility with co-workers for the lay out and installation of computer hardware and software. The job required minimal keyboarding activities which aggravated his CTS.

In February and again in March 1996, Crosby had surgery on his hands to relieve the pain he suffered from CTS. When Crosby returned to work in April 1996 after the operations, he wrote to his supervisor, sharing his health record, and again asking for a promotion to Grade 18 Senior Computer Programmer/Analyst within CSS. Crosby had retaken the Grade 18 exam and was first on the promotional list. Crosby continued to seek a promotion in CSS during the next few months without success.

By June 1996 he was involuntarily transferred out of CSS to a unit where keyboarding was part of the regular routine. His request to return to CSS was denied. In February 1997 Crosby secured a transfer to the NYS Office of Higher Education, as a Grade 18.

Crosby's Amended Complaint (14a-21a) asserts discrimination based upon his CTS disability by denying him a promotion, and by failing to provide a reasonable accommodation.

REASONS WARRANTING REVIEW BY THE SUPREME COURT

The outcome of Crosby's appeal to the Court of Appeals was controlled by that Court's decision in Garcia v. SUNY Health Sciences Center, supra. The holding in Garcia is in conflict with the holding in other circuits that have addressed the same issue, and have continued to recognize that when a state agency receives federal funds it waives its

immunity from disability claims based on Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. See 42 U.S.C. §2000d-7(a).

In Garcia the Court of Appeals held that so long as the ADA, including the abrogation of State sovereign immunity, was still considered good law, "a State accepting conditional federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, . . .since by all reasonable appearance state sovereign immunity had already been lost . . ." Garcia v. SUNY Health Science Center, supra at 114. The Court did not expressly factor in Sec. 12201 and makes no reference to Congress' provision that the ADA did not "limit the remedies, rights and procedures of any Federal law . . . that provides for equal protection for the rights of individuals with disabilities . . ."(emphasis added), 42 U.S.C. §12201(b). Once this Court held Title I of the ADA unconstitutional as

applied to the States, Board of Trustees v. Garrett, 531 U.S. 356, 148 L. Ed 20 866, 1215 Ct. 955 (2001), the waiver of immunity from claims under the Rehabilitation Act was presumably re-activated.

The time frame in which the Rehabilitation Act waiver was not in effect according to the Second Circuit analysis was arguably from July 26, 1992 (effective date of ADA for State employees) to February 21, 2001 (date Garrett decision issued). This is the time frame in which Crosby was alleged to have been discriminated against based on his CTS disability.

Most other Circuit Courts which have considered the interplay between the ADA and the Rehabilitation Act have rejected the Second Circuit analysis. See Doe v. Nebraska, 345 F 3d 593 (8th Cir. October 7, 2003); Garrett v. University of Alabama at Birmingham Board of Trustees, 344 F. 3d 1288 (11th Cir. September 11, 2003); A.W. v. Jersey City

Public Schools, 341 F 3d 234 (3rd Cir. August 19, 2003); Koslow v. Commonwealth of Pennsylvania, 302 F 3d 161, 172-173 (3rd Cir. 2002); Nihiser v. Ohio Environmental Protection Agency, 269 F 3d 626 (6th Cir. 12001).

In Pace v. Bogalusa City School Board, 325 F. 3d 609 (5th Cir. March 24, 2003) a panel of the Court followed the Garcia rationale. The Fifth Circuit en banc has decided to grant a rehearing, Pace v. Bogalusa City School Board, 339 F. 3d 348 (5th Cir. July 17, 2003).

Review of this appeal is warranted by the Supreme Court because of this conflict between the Circuits.

Review is also warranted because Crosby and undoubtedly other discrimination victims in the 1990's, who had fought for years to have their 504 claims heard on the merits, have been barred by fallacious reasoning in the Second Circuit. When the DOL accepted federal funds after the 1992 effective date of the ADA, its decision makers never

thought for a moment that the waiver of immunity that they had agreed to, at least since 1986 with the enactment of 42 U.S.C. 2000d-7, was now of no effect. Sec. 12201 (b) left no doubt that the ADA had no impact upon the existing statutory structure that protected Crosby and others from State action which discriminated against them based upon their disability.

The Legislative History of the ADA as reported in the Report of House Committee on Education and Labor in the 1990 U.S. Code Congressional and Administrative News No. 101-485(II), p. 418 states:

> Section 501 of the legislation specifies the relationship between this legislation and the Rehabilitation Act of 1973 and other Federal, State or local laws.
>
> With respect to the Rehabilitation Act of 1973, section 501(a) of the legislation specifies that nothing in this legislation should be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by the Federal agencies pursuant to such title.

The Report of House Judiciary Committee No. 101-485 (III) also makes it clear the ADA is to have no impact on the 1973 Rehabilitation Act.

> Under Section 501(a), nothing in the ADA is intended or should be construed to limit the scope of coverage or to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, or the regulations implementing that title. Thus, for example, the standards of title V of the Rehabilitation Act shall apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than Section 504 of the Rehabilitation Act.
>
> In those instances where the ADA explicitly provides a different standard from Section 504 of the Rehabilitation Act, the ADA standard applies to the ADA, but not to Section 504. For example, Section 504 requires that all of the programs of a recipient of federal financial assistance be available to persons with disabilities. This may require major structural changes in existing facilities, if other means are ineffective in achieving program access. No financial limitation is imposed.
>
> By contrast, the ADA adopts a lower standard of access to public

> accommodations for existing buildings under title III. Access must be provided only if it can be provided in a manner that is "readily achievable," that is, if it can be easily accomplished without much difficulty or expense, under Section (301)(5)(A), in light of a number of factors which are set forth in 301(5)(B). This is an instance in which the ADA provides a lesser standard than set forth in Section 504 of the Rehabilitation Act. This lesser standard applies only to the ADA and not to Section 504.
>
> Under Section 501(b) of the ADA, all of the rights, remedies and procedures that are available to people with disabilities under other federal laws, including Section 504 of the Rehabilitation Act, or other state laws (including state common law) are not preempted by this Act. This basic principle underlying this provision is that Congress does not intend to displace any of the rights or remedies provided by other federal (or) laws or other state laws (including state common law) which provide greater or equal protection to individuals with disabilities.

Congress meant for the 1973 Rehabilitation Act to remain in full force and effect. The Second Circuit Court of Appeals has distorted this intent. Petitioner affords this

Court an opportunity to clarify in this context that Congress' explicit preservation of existing anti-discrimination laws can not be dispensed with under the false premise that DOL decision makers could not make a knowing and intelligent waiver when accepting federal funds. The only logical conclusion to draw from the language and history of Sec. 12201 is that the Rehabilitation Act remained in full force and effect for all purposes after the ADA was enacted, and acceptance of federal funds waived State immunity.

This appeal also offers the Supreme Court an opportunity to address the distinction between a waiver of immunity under the Fourteenth Amendment and a waiver under the Spending Clause. The Court of Appeals in Garcia held the waiver of sovereign immunity must be "knowing and intentional" citing to College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 685-87, 144 L Ed 2d 605, 119 S. Ct. 2219 (1999).

The "waiver" discussed in College Savings is not the

same "waiver" contemplated under the Spending Clause. As analyzed by dissenting Circuit Judge Wiener in Johnson v. Louisiana Department of Education, 330 F 3d 362 (5th Cir. May 5, 2003), a waiver under the Fourteenth Amendment which must be "knowing and intentional" is not the same as a "waiver" which is a "condition precedent" to accepting federal funds.

In the present case, Congress exercising its Spending Clause powers offered funds to the New York State Department of Labor on the condition clearly stated in 42 U.S.C. 2000 d-7(a)(1) that by accepting the funds the Labor Department will not be immune under the Eleventh Amendment from suit in federal court for violation of Section 504 of the Rehabilitation Act and other named statutes. The NYS Department of Labor accepted the funds on this condition and now when Petitioner seeks to assert a 504 claim the Labor Department asserts it is immune despite having accepted the money and the condition attached to the

money. This condition followed the money even if the Department of Labor officials believed that they had no immunity to "waive".

In College Savings Bank, supra, 527 U.S. at 669 the questions presented were whether the Trademark Remedy Clarification Act, 106 Stat. 3567,

> . . .is effective to permit suit against a State for its alleged misrepresentation of its own product-either because the TRCA effects a constitutionally permissible abrogation of state sovereign immunity, or because the TRCA operates as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Lanham Act.

This Court held that there was no valid abrogation under the Commerce Clause or Sec. 5 of the Fourteenth Amendment Id at 672-675.

The Court then addressed the issue of "waiver". It rejected the concept that Florida could "impliedly" or "constructively" waive its immunity by engaging in activities

governed by the Trademark Act of 1940 (Lanham Act), 60 Stat. 441, 15 U.S.C. §1125(a). However, Justice Scalia writing for the majority explicitly distinguished Congress' authority under the Spending Clause to "condition its grant of funds to the State upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails agreement to the actions" Id at 577 U.S. at 686. Citing to South Dakota v. Dole, 483 U.S. 203, 97 L Ed 2d 171, 107 S. Ct. 2793 (1987).

As stated by Judge Wiener in Johnson v. Louisiana Department of Education, *supra*.

> Justice Scalia's majority opinion for College Savings Bank explains that the "knowing waiver" analysis applies only to federal statutes enacted pursuant to § 5 of the Fourteenth Amendment; that, in contrast, when a federal Spending Clause statute forthrightly conditions a state's acceptance of a congressional "gift" of funds on the state's relinquishment of sovereign immunity as an automatic consequence of such acceptance, a "fundamentally different" issue is presented. In Spending Clause cases, the only limitation on

> Congress's power to impose an express condition precedent of relinquishing sovereign immunity is that the statute thus conditioning acceptance of funds not be "coercive." As long as the condition is not coercive, the relinquishment of sovereign immunity is valid. The Court emphasized in College Savings Bank that this is a significantly lower constitutional hurdle for a federal statute than the one that must be cleared to establish "knowing waiver" of sovereign immunity under § 5 of the Fourteenth Amendment. (emphasis in original). Id at 367

The NYS Department of Labor agreed to a condition precedent when it accepted federal funds to support the program in which Petitioner was employed. At issue is not whether DOL knowingly was waiving its sovereign immunity, but whether it agreed it could be sued in federal court for a violation of Sec. 504 of the Rehabilitation Act. There can be no doubt that DOL accepted this condition precedent when it accepted the federal funds. This conclusion is consistent with the contractual relationship that exists between the Department of Labor and the federal

government for the benefit of disabled persons like Petitioner which this Court clarified and relied upon in ruling that punitive damages are unavailable for a 504 violation since they are traditionally not awarded for a contract violation. Barnes v. Gorman, 536 U.S.181, 186, 155 L Ed 2d 230, 122 S. Ct. 2097 (2002).

Requiring resolution of discrimination claims in federal court is not "coercive" and "is far less controlling of a State's behavior than the minimum - age drinking laws that were imposed on the States through Congress's exercise of its Spending Cause power, and which were specifically approved by the Supreme Court in South Dakota v. Dole." Johnson v. Louisiana Department of Education, supra at page 369-370.

Compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it elects to remain federally funded. See also North

Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962, 56 L Ed 2d 54, 98 S. Ct. 1597 (1978).

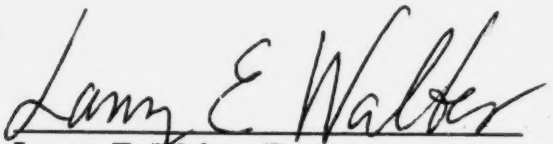
The Second Circuit has mistakenly ignored Congress' expressed effort to preserve the integrity of the 1973 Act protecting people with disabilities. For Crosby's sake and the sake of other persons whose rights Congress seeks to protect, he asks the Court to affirm this Congressional prerogative. He also asks the Court to clarify for the Circuits and the States that accepting federal funds does indeed entail waiver of 11th Amendment immunity when Congress so states without ambiguity.

This Petition raises compelling issues of statutory construction on which the Circuit Courts are in conflict. Review by the Supreme Court is warranted under Rule 10. Petitioner asks the Court to grant his Petition for a Writ of

Certiorari.

Dated: December 31, 2003

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS P. CROSBY,

Petitioner,

Docket No.:

-against-

NYS DEPARTMENT OF LABOR,

Respondent.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of October, two thousand three.

Filed

Present: HON. THOMAS J. MESKILL, October 3, 2003
HON. ROBERT A. KATZMANN,
HON. REENA RAGGI,
Circuit Judges.

THOMAS P. CROSBY,
Plaintiff-Appellant,

- v - No. 02-9490

NEW YORK STATE DEPARTMENT OF LABOR,

Defendant-Appellee.

Appearing For Plaintiff-Appellant:	LANNY E. WALTER, Esq. Walter, Thayer & Mishler Albany, NY
Appearing For Defendant-Appellee:	FRANK K. WALSH, Assistant Solicitor General (Nancy A. Spiegel, *of counsel)*, for ELIOT SPITZER, Attorney General for the State of New York, Albany, NY

UPON DUE CONSIDERATION of this appeal from the judgment of the United States District Court for the Northern District of New York, (Kahn, J.).

ON CONSIDERATION WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is **AFFIRMED.**

Plaintiff-appellant appeals from a stipulation of final judgment of the United States District Court for the Northern District of New York (Kahn, D.J.), filed December 4, 2002, that dismissed the complaint without prejudice to plaintiff's right to appeal.

The instant appeal seeks review of an order of that court, filed June 5, 2002, denying plaintiff's motion to vacate the order of Magistrate Judge Randolph F. Treece, filed October 16, 2001, and denying plaintiff's motion for leave to file a second amended complaint adding a claim under section 504 of the Rehabilitation Act, U.S.C. § 794(a). Familiarity with the facts is assumed.

The central question before us is whether the lower court abused its discretion in denying plaintiff's motion for leave to amend the complaint to add a claim under the Rehabilitation Act, where such a claim would be precluded by this Court's decision in Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d (2d Cir. 2001).

Given the posture of this case, our review is limited. The plaintiff did not attempt to distinguish Garcia below based on the time the plaintiff's claims accrued. We thus decline to address the question of when the state might first have knowingly waived sovereign immunity. We are, of course, bound by previous panel decisions of this court.

The judgment of the district court is AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: s/ *Lucille Carr*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS P. CROSBY,

Plaintiff,

- against -

STIPULATION TO FINAL JUDGMENT
97-CV-894
(LEK/RFT)

NYS DEPARTMENT OF LABOR,

Defendant.

WHEREAS, Plaintiff Thomas Crosby commenced this action *pro se* on June 26, 1997 seeking injunctive relief and monetary damages alleging violations of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* for conduct allegedly committed by Defendant New York State Department of Labor during 1995 and 1996; and

WHEREAS, by Stipulation between the parties, Plaintiff represented by Walter, Thayer & Mishler, P.C., filed an Amended Complaint on February 24, 1998 for violations of the ADA, and seeking injunctive relief and monetary damages; and

WHEREAS, on October 27, 1998, Defendant New York State Department of Labor, moved for Summary Judgment pursuant Fed. R. Civ. P. 56(b); and

WHEREAS, Plaintiff opposed the Summary Judgment motion on the merits, and on November 20, 1998 requested from the court additional time under the Uniform Pretrial Scheduling Order to apply to amend the Complaint to add a claim based upon the Rehabilitation Act of 1973; and

WHEREAS, in a decision dated April 7, 1999 this Court dismissed the action in its entirety for lack of subject matter jurisdiction; and

WHEREAS, the Plaintiff filed an appeal of that decision; and

WHEREAS, on October 25, 1999, the parties stipulated to vacate the April 7, 1999 judgment and remand the case to the District Court for reconsideration in light of the decision of the United States Court of Appeals for the Second Circuit in *Muller v. Costello*, 187 F.3d 298 (2d Cir.); and

WHEREAS, on February 21, 2001, the United Stated Supreme Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) held that Congress invalidly abrogated States' Eleventh Amendment immunity for damages under the ADA; and

WHEREAS, on or about May 29, 2001, the Plaintiff moved to amend the Amended Complaint to add a claim under § 504 of the Rehabilitation Act of 1973, and in an Order dated October 15, 2001, Magistrate Judge Treece denied that motion; and

WHEREAS, Plaintiff moved to vacate the Magistrate's Order under Fed.R.Civ.P. 72(a), and this Court denied that motion; and

WHEREAS, Plaintiff appealed the denial of his motion to amend the amended complaint to the Second Circuit Court of Appeals; and

WHEREAS, said appeal is premature and is going to be withdrawn without prejudice pursuant to Stipulation Withdrawing a Premature Appeal to be filed with the Court of Appeals; and

WHEREAS, Plaintiff is no longer employed by the State of New York and no longer seeks injunctive relief under the ADA; and

WHEREAS, Plaintiff has alleged no pendant State claim in this Action:

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, the attorneys for Plaintiff and Defendant, parties to the above entitled-action, that, whereas no party hereto is an infant or incompetent person for whom a committee has been appointed, and no person nor a party has an interest in the subject matter of the action, the United States District Court for the Northern District of New York may enter a Final Judgment dismissing this action without prejudice to Plaintiff's right to appeal the Final Judgment, bringing up for review the Court's Order dismissing his motion to amend the Amended Complaint to add a claim pursuant to the Rehabilitation Act of 1973, and without prejudice to Plaintiff, pursuing whatever State cause of action he may now possess.

Dated: November 21, 2002

Eliot Spitzer
Attorney General of the
State of New York

By: s/ *Karen Marcoux Mankes*
Karen Marcoux Mankes, Esq.
Ass't Attorney General, of Counsel
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Dated: October 31, 2002

s/ *Lanny E. Walker*
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS P. CROSBY,

Plaintiff,

- against -

June 5, 2002
Lawrence K. Baerman
Clerk, Albany

NYS DEPARTMENT OF LABOR,

Defendant.

LAWRENCE E. KAHN
U.S. District Judge

MEMORANDUM-DECISION AND ORDER

Before the Court is a motion by Plaintiff appealing from an October 16, 2001 Order by Magistrate Judge Randolph F. Treece that denied Plaintiff's motion for leave to amend his complaint in order to add a claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (1995).

The facts relevant to this motion are outlined in Magistrate Treece's Order.

I. Standard of Review

If a party timely files and serves objections to a non-dispositive pretrial order of the magistrate judge, the district judge to whom the case is assigned shall consider all objections made and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. See Fed.R.Civ.P. 72(a); N.D.N.Y.L.R. 72.1(b).

It has long been established that a finding is clearly erroneous

when although there is evidence to support it, the reviewing court, upon considering all of the evidence, is left with the definite and firm conviction that a mistake has been committed. See Champion Home Builders Co. v. ADT Sec. Servs., 179 F.Supp.2d 16, 29 (N.D.N.Y. 2001) (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

II Magistrate Judge Treece's Order

Judge Treece denied Plaintiff's motion to amend because he found that Plaintiff's amendment would be futile. Specifically, Judge Treece found that Plaintiff's proposed claim is barred by the Eleventh Amendment doctrine of state sovereign immunity. Judge Treece based this finding on the Second Circuit's decision in Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 280 F.3d 98 (2d Cir. 2001). In Garcia, the Second Circuit found that "a state accepting conditional federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits [under the ADA]." Id. at 114 n.4 ("[E]ven the most studied scholar of constitutional law would have little reason to doubt the validity of Congress's asserted abrogation of New York's sovereign immunity as to private damage suits under Title II.") Simply put, New York State could not waive something that it did not even think existed. The Second Circuit extended this reasoning to Section 504 of the Rehabilitation Act, finding that "the proscriptions of Title II and § 504 are virtually identical." Id. at 114.

Judge Treece found that Garcia was particularly applicable to Plaintiff's request for amendment because the same time period was involved in both cases. If the Garcia court did not believe that New York State had any reason to know that it was waiving its immunity through the acceptance of federal funding during the years 1993-1995, then there is not reason to believe in this action that New York State should have had that knowledge during those same years.

III Plaintiff's Motion

Plaintiff's sole reason for appealing the Magistrate's decision is his disagreement with the principles of law espoused by the Garcia court. Plaintiff states that he "believes the holding in Garcia is in error with reference to the State's waiver of immunity for private claims against the State pursuant to Sec. 504 of the 1973 Rehabilitation Act." Pl. Br. at 1. Plaintiff goes on to argue that the Second Circuit wrongly decided Garcia. Plaintiff does not, however, argue that Magistrate Treece wrongly construed the law as laid out in Garcia, nor that he erred in his application of that law to this action. Plaintiff's arguments, therefore, do not present a valid reason for this Court to overturn Magistrate Treece's Order. As stated above, this Court will overturn a magistrate's decision only when it is contrary to law. Magistrate Treece's Order, by contrast, is firmly based on the applicable law as outlined by the Second Circuit in Garcia.

CONCLUSION

For the reasons stated above, it is hereby:

ORDERED that Plaintiff's motion to vacate Magistrate Judge Treece's October 16, 2001 Order is **DENIED**; and it is further

ORDERED that Plaintiff's motion for leave to file a second amended complaint is **DENIED**; and it is further

ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

DATED: June 4, 2002
Albany, New York

s/ *Lawrence E. Kahn*
HONORABLE LAWRENCE E. KAHN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS P. CROSBY,

Plaintiff,

Filed
October 16, 2001

No. 97-CV-0894
- v - (LEK/RFT)

NEW YORK STATE DEPARTMENT OF LABOR,
Defendant.

APPEARANCES: **OF COUNSEL:**

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RANDOLPH F. TREECE
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending is plaintiff's motion for leave to file a second amended complaint to add a claim under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701-797b (1995). Docket nos. 53 & 54. Defendant opposes the motion. Docket nos. 56 & 57. For the reasons that follow, plaintiff's motion is denied.

PROCEDURAL HISTORY

On June 26, 1997, plaintiff Thomas P. Crosby ("Crosby") filed this action alleging defendant New York State Department of Labor ("defendant" or "NYSDOL") violated the anti-discrimination provisions of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. See docket no. 1. On December 4, 1998, NYSDOL moved for summary judgment pursuant to Fed. R. Civ. P. 56(b) claiming, inter alia, that it is immune from suit under the ADA pursuant to the Eleventh Amendment. Docket nos. 22-25. Crosby opposed the motion and alternatively moved to amend the complaint to add a claim under the Rehabilitation Act. Docket nos. 26-28. In a decision and order dated April 7, 1999, the Honorable Lawrence E. Kahn granted defendant's motion for summary judgment and denied Crosby's motion to amend the complaint, holding that both the ADA and the Rehabilitation Act failed to validly abrogate Eleventh Amendment immunity. Docket no. 40, pp. 5-6.

Following Judge Kahn's decision, the Second Circuit held in Muller v. Costello that the ADA validly abrogated the Eleventh Amendment immunity. 187 F.2d 298 (2d Cir. 1999). Therefore, on December 16, 1999, the parties stipulated to vacating the judgment and remanding this action for further proceedings in light of Muller. Docket no. 55. On February 24, 2000, the Second Circuit held in Kilcullen v. New York State Dep't of Transp., that the Rehabilitation Act also validly abrogated Eleventh Amendment immunity. 205 F.3d 77 (2d Cir. 2000), abrogation rec'd by, Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, __ F.3d 2003 WL 1159970 (2d Cir. Sept. 26, 2001). Thus, Crosby renewed his motion to amend the complaint.

DISCUSSION

Fed.R.Civ.P. 15(a) states, in pertinent part, that leave to amend the complaint should be "freely given when justice so requires." Indeed, leave to amend should be denied only in the face of undue delay, bad faith, undue prejudice to the non-movant, futility of amendment or where the movant has repeatedly failed to cure deficiencies in previous amendments. Foman v. Davis, 371 U.S. 178, 182 (1962); Day v. Morgenthau, 909 F.2d 75, 78 (2d Cir. 1990). Furthermore, district courts are vested with broad discretion to grant a party leave to amend the pleadings. See Local 802, Assoc. Musicians of Greater N.Y. v. Parker Meriden Hotel, 145 F.3d 85, 89 (2d Cir. 1998). Here, Crosby seeks leave to amend his complaint to add a claim under the Rehabilitation Act. Specifically, Crosby contends that since New York State accepts federal funds, it has waived Eleventh Amendment immunity. See Pl. Mem. of Law (docket no. 54), point II. Defendant opposes the proposed amendment on the ground of futility.

A proposed amendment is futile where it fails to cure deficiencies in the original complaint, Acito v. Imcera Group, Inc., 47 F.3d 47, 54-55 (2d Cir. 1995), or where it would not survive a motion to dismiss. Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001). Therefore, to determine whether a proposed amendment is futile, it must be analyzed under the same standard as a Fed.R.Civ.P 12(b)(6) motion to dismiss. See id. Here, NYSDOL contends that the proposed amendment is futile because New York State did not waive Eleventh Amendment immunity by accepting federal funds.[1]

On February 21, 2001, the Supreme Court held that Title I of the ADA did not validly abrogate Eleventh Amendment immunity, thus calling the Second Circuit's decisions in Muller and Kilcullen into question. See Board of Trustees of the Univ. of Alabama v.

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[1] NYSDOL concedes that it accepts federal funds. See Def. Mem. of Law (docket no. 57), p. 5 n. 2.

Garrett, 531 U.S. 356 (2001). Since the decision in Garrett, the Second Circuit held that in enacting Title II of the ADA, Congress exceeded its power under section 5 of the Fourteenth Amendment and therefore, failed to validly abrogate Eleventh Amendment immunity. Id. at *9. The Second Circuit further held that since "[section] 504 of the Rehabilitation Act and Title II of the ADA offer essentially the same protections for people with disabilities, [the] conclusion that Title II of the ADA as a whole exceeds Congress's authority under [section] 5 of the Fourteenth Amendment applies with equal force to [section] 504 of the Rehabilitation Act." Id. at 10.

As noted in Garcia, however, the Rehabilitation Act was also enacted pursuant to Congress's Article I Spending Clause authority. Id. (citing U.S. Const. art. I, § 8, cl. 1). Thus, Congress may condition federal funds on a waiver of Eleventh Amendment immunity. Indeed, the Rehabilitation Act specifically contains such a condition. See 42 U.S.C. § 2000d-7; see also Garcia, 2001 WL 1159970, at *10. Nonetheless, a waiver of Eleventh Amendment immunity must be an "intentional relinquishment or abandonment of a known right or privilege." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (citation omitted); see also Garcia, 2001 WL 1159970, at *11. In Garcia, the Second Circuit held that at the time New York State accepted federal funds, "Title II of the ADA was reasonably understood to abrogate New York's [Eleventh Amendment] immunity under Congress's Commerce Clause authority." 2001 WL 1159970 at *11. Furthermore, since Title II of the ADA and section 504 of the Rehabilitation Act are "virtually identical," New York State reasonably believed it did not knowingly waive immunity by accepting federal funds. Id.

Garcia is controlling here. An argument may be made that New York State knowing waives Eleventh Amendment immunity for claims brought under the Rehabilitation Act if it continues to accept federal funds. See Garcia, 2001 WL 1159970, at *11 n. 4. Garcia, however, involved essentially the same time period alleged in Crosby's complaint. Therefore, Crosby is barred by the Eleventh Amendment from asserting a claim for damages under the

Rehabilitation Act.

WHEREFORE, it is hereby

ORDERED that Crosby's motion for leave to amend the complaint is **DENIED.**

IT IS SO ORDERED.

Dated: October 15, 2003
Albany, New York

_____
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS P. CROSBY,

Plaintiff,

Amended Complaint
97-CV-0894
- against - (LEK/RWS)
Jury Trial Demanded

NEW YORK STATE DEPARTMENT
OF LABOR,

Defendant.

THOMAS P. CROSBY for his Amended Complaint hereby states:

Jurisdiction

1. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and §1343(a)(3) and (4), 42 U.S.C. §12117, and 42 U.S.C. §20000-5(f), (g), (j) & (k)

Venue

2. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because all claims arose within the Northern District

Summary of Claim

3. Plaintiff as a result of his employment at the Department of Labor (hereafter DOL) and other State agencies has developed carpal tunnel syndrome (hereafter CTS). As a result of his CTS plaintiff has been denied a promotion from Grade 14 to Grade 18

as a Senior Computer Programmer/Analyst and has not been afforded the reasonable accommodation to which he is entitled as a qualified individual with a disability.

Parties

4. Plaintiff is an adult resident of the County of Saratoga, State of New York, and is a U.S. Citizen who was employed at Building 12 on the State Office Campus complex in Albany, New York from October 16, 1995 to February 6, 1997 and who is a qualified individual with a disability pursuant to 42 U.S.C. §12111(8).

5. Defendant is the New York State Department of Labor, an employer covered by the Equal Opportunity for Individuals with Disabilities Act (known as ADA) and responsible for compliance with the terms of said Acts.

Exhaustion of Administrative Remedies

6. Plaintiff filed a complaint with the EEOC on September 5, 1996.

7. On March 31, 1997 the EEOC issued a Dismissal and Notice of Rights finding no violation of the statute and gave plaintiff a 90 day notice to commence a federal law suit.

8. Plaintiff commenced the present action pro se on June 26, 1997, within the 90 day period.

Statement of Facts

9. Plaintiff commenced employment with defendant Department of Labor (DOL) on August 7, 1986 and on October 22, 1992, he became a Grade 14 Computer Programmer/Analyst.

10. After qualifying for a promotion to a Grade 18 Senior Computer Programmer/Analyst, plaintiff was able to secure a position at the Department of Health on December 16, 1994.

11. Plaintiff developed pain and weakness in his hands during 1995 and was diagnosed with CTS in early September 1995.

12. Because plaintiff's illness interfered with his sleep, caused him to become irritable and generated conflict with his supervisors at the Department of Health, and because he was also concerned about threatened lay-offs in the Health Department, on September 5, 1997, plaintiff wrote to Bill Kurtzner at DOL to request a return to DOL as a Grade 18 based upon plaintiff's prior experience at DOL as a Grade 14, his experience at DOH and his civil service eligibility.

13. Although Mr. Kurtzner denied the promotion, plaintiff returned to his Grade 14 position at DOL on October 10, 1995.

14. Immediately after returning to DOL plaintiff submitted to appropriate officials at the Department a written request for a reasonable accommodation for his severe bilateral carpal tunnel syndrome as well as a history of lower back pain.

15. Plaintiff requested an ergonomic keyboard and chair. He was provided with neither initially and one month later was given only a suitable chair.

16. During his first month back at DOL plaintiff was assigned to a position in which he was required to write programs all day on a computer keyboard thereby aggravating his CTS.

17. After approximately one month, plaintiff was transferred to Customer Service and Support (hereafter CSS) where he was not required to do much keyboard or repetitive work with his hands.

18. Plaintiff's CTS continued to disable him and in February 1996 he was granted a 6 week leave for an operation on his CTS.

19. While the operation was generally successful, plaintiff continued to be a qualified individual with a disability who required reasonable accommodation to his physical limitation due to his CTS condition.

20. After returning to work, plaintiff renewed his request for a promotion to Grade 18 in April and May 1996.

21. These requests were denied repeatedly for reasons that plaintiff believes were pre-textual.

22. He was told that he had not been employed at CSS for a sufficient period of time when in fact he had been with the DOL for over 10 years, and had been a Grade 14 Computer Programmer/Analyst since 1993, had functioned successfully as a Grade 18 at DOH, and had been with CSS since November 1995. In addition, any promotion would have been probationary and subject to evaluation and review.

23. He was told there were no items available for appointment. On information and belief, there had been items available at Grade 18 since plaintiff returned to DOL and there were Grade 18 items available subsequent to May 1996 which were appropriate for plaintiff but not offered to him.

24. He was also told that persons on other lists took precedence over his promotion. On information and belief, there were no preferential lists giving other persons a superior claim to a Grade 18 Senior Computer Programmer/Analyst position.

25. On or about May 7, 1996 plaintiff renewed his October 1995 request for an ergonomic keyboard by submitting to the Department of Labor a medical note stating this was needed "to prevent further carpal tunnel syndrome/tendonitis".

26. The keyboard was finally provided to plaintiff shortly thereafter.

27. On June 6, 1996 plaintiff was advised by Manager Deborah J. Heaphy that he was being returned to the DOL in October 1995 and which required constant keyboard work.

28. On June 11, 1996 plaintiff submitted to the Department of Labor a statement from his doctor declaring "Mr. Crosby should

not return to a job requiring substantial keyboard time."

29. With the medical statement plaintiff submitted a formal Request for Reasonable Accommodation seeking to remain in CSS which required programmers to spend considerably less time at the keyboard that the unit to which he was being transferred in which programmers work at the keyboard seven and one-half hours per day.

30. Effective June 17, 1996 plaintiff was transferred to the former unit.

31. Plaintiff waited two months for a formal decision on his request for reasonable accommodation. In the meanwhile, he was given little work to do and felt ostracized by his co-workers who, on information and belief, resented his lack of production.

32. The formal decision left plaintiff in the unit where the job function required more keyboarding than he was physically able to perform without aggravating his carpal tunnel syndrome.

33. Although the formal decision states that plaintiff "will not be required to use the keyboard heavily in your assignments," it left him in a unit where he could not participate on fair and equal basis with co-workers, and where he still was expected to do a substantial amount of keyboarding.

34. Plaintiff notified the DOL that he found its "reasonable accommodation" unacceptable and on August 25, 1996 asked for review by the Compliance Review Board of the Department of Civil Service.

35. Having received no response to this request, plaintiff filed an EEOC charge on September 5, 1996.

36. In August and October 1996 and January 1997 plaintiff again sought a promotion to Grade 18. On information and belief plaintiff was more qualified than the persons who were promoted instead of him. In particular, an individual named Jay Romeo who

was promoted by William Kurtzner at DOL had, on information and belief, no or little programming experience.

37. Plaintiff's situation remained unchanged until he secured a promotion to Grade 18 and transfer to Higher Education Service Corporation on February 6, 1997.

38. On information and belief, plaintiff was transferred to a unit whose function required greater keyboard usage and was denied a promotion in order to cause him to seek employment and promotion outside the DOL so that DOL would not be burdened by his ongoing CTS.

39. As a result of defendant's failure to accommodate plaintiff's known physical impairment in a reasonable manner and as a result of defendant's failure to promote plaintiff because of his disability, plaintiff has suffered significant emotional distress and humiliation and pain and discomfort due to the aggravation of his carpal tunnel syndrome.

And As For A First Cause of Action

40. Paragraphs 1 through 39 inclusive are incorporated into this First Cause of Action.

41. The DOL has discriminated against plaintiff, a qualified individual with a disability because of plaintiff's disability, in regard to plaintiff's advancement to a Grade 18 Senior Computer Programmer/Analyst in violation of 42 U.S.C. §12112(a).

And As For A Second Cause of Action

42. Paragraphs 1 through 39 inclusive are incorporated into this Second Cause of Action.

43. The DOL has discriminated against plaintiff, a qualified individual with a disability because of plaintiff's disability, by classifying plaintiff in a way that adversely affects his opportunities and status as an employee because of his disability by assigning

plaintiff to a unit whose function he cannot perform because of his disability and causing him alienation from co-employees in violation of 42 U.S.C. §12112(b)(1).

And As For A Third Cause of Action

44. Paragraphs 1-39 inclusive are incorporated into this Third Cause of Action.

45. The DOL has discriminated against plaintiff, a qualified individual with a disability because of plaintiff's disability, by not making reasonable accommodations to the known physical limitations of plaintiff after he transferred back to the DOL in October 1995, there being no undue hardship on the operation of DOL had it made reasonable accommodation to plaintiff's known physical limitations in violation of 42 U.S.C. §12112(b)(5)(A).

And As For A Fourth Cause of Action

46. Paragraphs 1 through 39 inclusive are incorporated into this Fourth Cause of Action.

47. The DOL has discriminated against plaintiff, a qualified individual with a disability because of plaintiff's disability, by denying employment opportunities to him because of the need for the DOL to make reasonable accommodation to the physical impairments of plaintiff by refusing to assign plaintiff to a programming unit whose function involved minimal routine keyboard work and by refusing to promote plaintiff thereby causing him to seek a job assignment and promotion outside the DOL in violation of 42 U.S.C. §12112(b)(5)(B).

Wherefore, plaintiff respectfully requests injunctive relief prohibiting the discrimination alleged herein and directing the appointment of plaintiff to the Grade and position he would have enjoyed but for the unlawful discrimination, awarding backpay, and benefits lost as a result of the discrimination, requiring defendant to provide a reasonable accommodation to plaintiff's known physical impairment, awarding any front pay to which

plaintiff may be entitled, plus the costs and attorney fees associated with prosecuting this action.

s/ Lanny E. Walter

Dated: February 24, 1998
Albany, New York

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